

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-4213

Signed

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAID OF THE MIST CORPORATION and
AFFILIATED CORPORATIONS,

Appellant

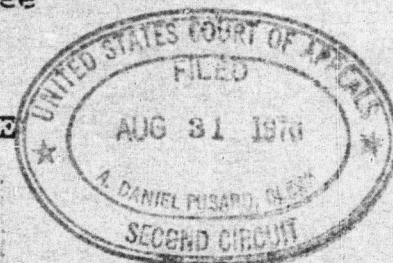
v.

COMMISSIONER OF INTERNAL REVENUE.

Appellee

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE



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v.

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ON APPEAL FROM THE DECISION OF THE
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BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Whether the Tax Court correctly decided that taxpayer ordered an excursion boat from a Canadian shipbuilding company at a time during which the investment tax credit on foreign-produced goods was suspended.

STATEMENT OF THE CASE

Maid of the Mist Corporation (taxpayer) brings this appeal from a decision of the United States Tax Court (Judge Wiles), entered on August 11, 1977, sustaining a deficiency in income tax for the year 1972 in the amount of \$11,881.61. (R. 2.)^{1/}

1/ "R." references are to the separately bound record appendix.

The opinion of the Tax Court (Judge Tannenwald) (R. 3-9) is unofficially reported at P-H Memo T.C., par. 77,263. Taxpayer's notice of appeal was filed on November 11, 1977.^{2/} Jurisdiction is conferred upon this Court by Section 7482 of the Internal Revenue Code of 1954.

The facts of this case are essentially undisputed and may be summarized as follows:

Taxpayer is a New York corporation with its main office located at Niagara Falls, New York. (R. 17.) Its principal business involves the operation of excursion boats at the foot of Niagara Falls. Sometime prior to December, 1971, taxpayer decided to expand its fleet of excursion boats, and on December 16, 1971, James V. Glynn (Glynn), taxpayer's president, met with representatives of Hike Metal Products, Ltd. (Hike), a Canadian shipbuilding concern which had previously built excursion boats for taxpayer. At this meeting, which took place in Port Dover, Ontario, a contract between Hike and taxpayer concerning the construction and purchase of an excursion boat (later named Maid of the Mist III (R. 153)) was signed.^{3/} The contract had been drafted by taxpayer's counsel two days before the meeting, and was apparently

^{2/} The notice of appeal bore a November 9, 1977, postmark, and, thus, was timely. See Section 7502 of the Internal Revenue Code of 1954 (26 U.S.C.).

^{3/} The parties to the contract were actually Hike and Maid of the Mist Steamboat Co., Ltd., a Canadian corporation which was taxpayer's wholly owned subsidiary. For the taxable year 1972, taxpayer elected to treat its Canadian subsidiary as a domestic corporation, and a consolidated corporate income tax return was filed for that year. (R. 4-5, 17-18.)

the result of prior negotiations between the parties. The purchase price was approximately \$122,000. (R. 5, 18-19, 24-43, 156.)

The contract provided (R. 33) that "Title to and property in the Vessel shall be vested in the Shipowner [i.e., taxpayer] from the signing of this contract." The contract also provided (R. 27) that \$3,000 of the purchase price was to be paid to Hike when the contract was signed. Although the contract was signed by the parties on December 16, 1971, Glynn did not pay Hike the \$3,000 at that time, despite the fact that he had a check for that amount--dated December 16, 1971, and made payable to Hike--in his possession during that December 16 meeting. (R. 5, 19, 45.) Instead, Glynn delivered the signed contract to Hike, together with a letter which read as follows (R. 5-6):

We hand you herewith original and duplicate copy of contract for the construction of a vessel, duly executed by the Ship Owner.

This contract is conditionally delivered to you and such delivery shall become final when you are in receipt of the Ship Owner's check payable to your order in the sum of \$3,000.00.

As you are aware, this contract contemplates the building of a ship which Ship Owner will be able to place in the Niagara River beneath the Falls of Niagara by the use of cranes. As of this date, the contract for such delivery has not been executed and it is anticipated that it will be executed within the next few days and, upon the acceptance of that contract, the undersigned will forward to you the above-mentioned check.

In the event that delivery of the contemplated vessel is not possible by crane, then it will be necessary for us to enter

into a new contract, which will call for the building of the vessel and the delivery in parts to the Maid of the Mist Landing and its reassemblage at that point before launching. Therefore, the necessity of conditioning this delivery this date.

On December 18, 1971, taxpayer and Modern Crane Rentals, Ltd., signed a contract for the delivery of the excursion boat by crane to the bottom of the Niagara River Gorge (R. 6, 19, 46-53), and on that same day Glynn mailed the \$3,000 check to Hike from an Ontario, Canada, post office box (R. 6, 20). The \$3,000 check was received by Hike on December 21, 1971. (R. 6, 20, 157.) The excursion boat was delivered to taxpayer in June, 1972. (R. 6, 20.)

In its return for the year 1972, taxpayer claimed a 7 percent investment tax credit for the purchase of the Maid of the Mist III. The Commissioner, however, disallowed the credit, on the ground that the excursion boat was acquired pursuant to an "order" placed between August 16, 1971, and December 20, 1971--when the investment tax credit provisions were suspended with respect to foreign-manufactured goods pursuant to Section 48(a)(7) of the Internal Revenue Code of 1954. The Tax Court sustained the Commissioner's determination, holding that taxpayer had placed its order for the Maid of the Mist III no later than December 18, 1971. (R. 6-9.) In the court's view, the mailing of the \$3,000 check to Hike on that date constituted "at the very least * * * an unconditional offer to purchase the vessel and therefore an 'order' by [taxpayer] as of that date." (R. 8.) The court also

concluded that the parties had agreed "to be bound by the December 16 agreement, subject only to * * * [taxpayer's] obtaining a contract for the delivery of the vessel," which was accomplished on December 18, 1971. (R. 8.)

From that adverse decision, taxpayer brings this appeal.

SUMMARY OF ARGUMENT

The Tax Court was correct in holding that taxpayer ordered an excursion boat from a Canadian shipbuilding company within the period (August 16 to December 20, 1971) during which the investment tax credit on foreign-produced goods was suspended pursuant to Section 48(a)(7) of the Internal Revenue Code of 1954. As stated in the applicable Treasury Regulations and Congressional Reports, an "order" need not be a binding contract, but is merely "any directive, written or oral, to another person reasonably designed to effect the acquisition of property at a later date." An order, therefore, is a unilateral act taken by a potential buyer, and is something less than a binding contract, since no seller acceptance is involved. Here, the actions taken by taxpayer prior to December 20, 1971, clearly constituted a directive reasonably designed to effect the acquisition of an excursion boat at a later date, and, hence, an "order." Indeed, a binding contract existed no later than December 18, 1971.

To begin with, the signing of the shipbuilding contract with Hike on December 16, 1971, established all of the terms and conditions of sale except one--the method of delivery. But the conditional nature of the contract--i.e., taxpayer was not required

to accept a fully assembled ship at the top of the Niagara River Gorge if it were unable to obtain a crane contract--does not vitiate the contract under Canadian law. Rather, it merely imposes a contingency upon the continuing performance of the parties under a binding contract. Indeed, it is difficult to understand how taxpayer could be vested with "Title to and property in the Vessel * * * from the signing of * * * [the December 16] contract" if it had not even "ordered" such vessel by that date.

But even assuming the December 16 contract was not technically binding at that time, the obtaining of the crane contract and the mailing of the \$3,000 check to Hike on December 18, 1971, unconditionally bound the parties to their agreement, and the Tax Court so held. By the terms of the December 16 letter, taxpayer was required to mail the check to Hike when the crane contract was secured. Hike's receipt of the check can be viewed as merely notification that the condition was met. The existence of a binding contract, however, does not depend upon notice that a particular condition has been fulfilled.

In any event, taxpayer's actions in (1) executing a ship-building contract with Hike, (2) securing a crane contract, and (3) mailing the \$3,000 check to Hike--all of which occurred during the suspension period--constituted an "order" within the meaning of Section 48(a)(7) of the Internal Revenue Code of 1954. Indeed, after the crane contract was obtained and the check sent to Hike, there was nothing further taxpayer could have done to "effect the acquisition" of an excursion boat. Consequently, taxpayer is

ineligible for the investment tax credit since it ordered the excursion boat during the period for which such credit on foreign-produced goods was suspended.

ARGUMENT

TAXPAYER ORDERED AN EXCURSION BOAT FROM
A CANADIAN SHIPBUILDING COMPANY WHILE
THE INVESTMENT TAX CREDIT ON FOREIGN-
PRODUCED GOODS WAS SUSPENDED

On August 15, 1971, the President, in an effort to reduce the country's balance-of-payments deficit and strengthen its international economic position, issued Proclamation 4074, 85 Stat. 926, which imposed a 10-percent import surcharge on foreign-produced goods brought into the United States. (R. 21-23.) In a related move, Congress thereafter enacted Section 48(a)(7) of the Internal Revenue Code of 1954, Appendix A, infra, which temporarily limited the investment tax credit (see Sec. 38 of the 1954 Code) to items produced in the United States. Code Section 48(a)(7), passed as Section 103 of the Revenue Act of 1971, P.L. 92-178, 85 Stat. 497, provides in pertinent part as follows:

(7) Property completed abroad or predominantly of foreign origin.--

(A) In general.--Property * * * shall not be treated as section 38 property if--

(i) such property was completed outside the United States, or

(ii) less than 50 percent of the basis of such property is attributable to value added within the United States.

*

*

*

(B) Period of paragraph.--
Except as provided in paragraph (D), sub-
paragraph (A) shall apply with respect to
property described in section

(i) the construction, reconstruction, or
erection of which by the taxpayer is begun
after August 15, 1971, on or before the
date of termination of Proclamation 4074, or

(ii) which is acquired pursuant to an order
placed on or before the date of termination of
Proclamation 4074, unless acquired pursuant
to an order which the taxpayer establishes
was placed before August 16, 1971. (Emphasis
supplied.) 4/

*

*

*

On December 20, 1971, the President terminated Proclamation 4074.
See Presidential Proclamation 4098, 86 Stat. 1591. (R. 54-55.)
Thus, foreign-manufactured goods acquired pursuant to an order
placed between August 16, 1971, and December 20, 1971, are
ineligible for the investment tax credit. The sole issue pre-
sented in this appeal, then, is whether taxpayer "ordered" Maid
of the Mist III on or before December 20, 1971.

4/ See H. Rep. No. 92-533, 92d Cong., 1st Sess., p. 19 (1972-1
Cum. Bull. 498, 505):

In view of our balance of payment difficulties,
your committee believes that the [investment tax]
credit should be available only with respect to
domestically produced property during the period
the temporary 10 percent additional duty is in
effect. As a result, the bill provides that the
credit is not to apply with respect to any
foreign produced property which the taxpayer ac-
quires prior to the termination of the additional
duty proclaimed by the President on August 15,
1971 (or any property which is acquired at any time
as the result of an order placed before that
termination date).

Section 1.48-1(o)(2)(i) of the Treasury Regulations on Income Tax (1954 Code), Appendix A, infra, describes an "order" as follows:

An order is any directive, written or oral, to another person reasonably designed to effect the acquisition of property at a later date. An order need not be a binding contract. * * *

This regulation tracks language contained in a House Committee Report accompanying the passage of an earlier act (Act of November 8, 1966, P.L. 89-800, 80 Stat. 1508, Sec. 1) which suspended the investment tax credit for property acquired, ordered, or whose construction was begun between October 10, 1966, and January 1, 1968. See H. Rep. No. 2087, 89th Cong., 2d Sess., p. 30 (1966-2 Cum. Bull. 916, 917):

If an order for construction, reconstruction, or erection of property, or an order for property, is placed by the taxpayer during the suspension period, such property is suspension period property even if construction, reconstruction, erection, or acquisition of such property is begun after the end of the suspension period. For these purposes, an order placed with respect to property during the suspension period need not be a binding contract or a formal written document. Any directive, written or oral, to another person reasonably designed to effect the acquisition of property at a later date, constitutes an order.

An "order," therefore, is something less than a binding contract, since there is no element of a seller's acceptance--critical to the existence of a contract--involved in the term order. In other words, the placing of an order for goods is merely a unilateral act taken by a potential buyer, whereas a binding contract requires bilateral assent between a buyer and

seller. Of course, if a binding contract exists, there has necessarily been an "order," and the court below recognized that fact. (R. 155.)

Under these guidelines, we think the Tax Court was clearly correct in holding that taxpayer "ordered" its excursion boat while the investment tax credit provisions were suspended. Indeed, it is our position that a binding contract existed between the parties on December 16, 1971, or, at the very latest, on December 18, 1971, when the crane contract was signed and the \$3,000 check was mailed to Hike.

1. As noted earlier, the contract for the construction and purchase of the Maid of the Mist III was signed by the parties on December 16, 1971. The contract contained, inter alia, a detailed description of the proposed vessel, insurance and risk of loss provisions, warranties, default provisions, an arbitration clause, and the dates and amounts of payment. In other words, the contract expressed taxpayer's agreement to purchase and Hike's agreement to construct a specified excursion boat for a specified price, and, as a result of this agreement, taxpayer obtained the vessel described in the contract. Upon the signing of this agreement, therefore, a binding contract was made, and the December 16, 1971, letter delivered by taxpayer to Hike when the agreement was signed does not alter that conclusion, for that letter merely attached a condition to the continuing obligation of the parties to perform under an existing contract.

The only uncertainty on December 16, 1971, related to the method of delivery. That is, if a crane contract was secured, the boat would be delivered intact to the Hydro dock at Chippera, Ontario, according to the December 16 contract (R. 47), whereas if a crane contract was not obtained, the purchase contract would be modified to provide that the boat would be delivered in parts to the Maid of the Mist Landing and then reassembled. Thus, taxpayer agreed to buy an excursion boat from Hike for \$122,000, but if a particular contingency occurred (i.e., if no crane contract was obtained), then taxpayer would no longer be obliged to accept a boat delivered intact to Hydro dock. In effect, the necessity of obtaining a crane contract in this case is analogous to a "subject to adequate financing" clause contained in a real estate contract. Although a binding contract exists in the latter situation, the continuing performance of the parties is contingent upon the buyer securing a real estate mortgage. The contingency clause itself, however, does not prevent a binding contract from coming into existence. For example, in McCool v. Grant & Dunn, 48 Ont. L. R. 630 (1921) (R. 132-136), the parties had been bargaining for the purchase and sale of lumber. The terms of the sale were agreed to by the parties, except that the sellers wanted their bankers to be satisfied with the buyer's ability to pay. The sellers' written answer to the offer was in the form of a letter and contained the following words, "'we * * * are prepared to accept your offer provided you can satisfy our bank that all this stuff will be paid for as per our conversation.'"

(R. 132.) The sellers' bankers were in due course satisfied, but the sellers then attempted to negate the sale. The court held that a binding contract was formed by the sellers' letter, subject to the condition that the sellers' bankers be satisfied. The buyer was therefore awarded damages for the sellers' refusal to deliver the lumber. Similarly, in Harkness v. Pleasance, [1913] 12 D.L.R. 842 (R. 137), an agreement was signed for the sale of a lease and house contents, subject to the consent of a third party having an interest in the lands. Within one month after the agreement was signed the required consent was obtained, but the buyer meanwhile repudiated, "claiming that there was no contract prior to the consent being obtained." (Ibid.) The court, however, rejected this contention and held that "the contract was effective as of its date, subject to the consent being obtained, and * * * there was no right to withdraw, pending the reasonable delay for obtaining such consent as arranged between the parties." (Ibid.)

Language contained in H. Rep. No. 2087, supra, supports this view. In discussing paragraph (3) of Code Section 48(h)--which provides that the 1966 investment tax credit suspension will not apply to the acquisition of property during the suspension period pursuant to a "binding contract" entered into before the suspension period--the House Report states that a contract will be considered binding "even if the obligation which it imposes on the purchasers is conditional on the happening of certain contingencies to take place after" the suspension becomes effective, so long as the

contingencies are not "within the unrestricted control of the purchaser" (and so long as the contingencies do, in fact, occur). H. Rep. No. 2087, supra, p. 31 (1966-2 Cum. Bull., p. 918). In the instant case, the letter delivered to Hike implicitly imposed upon taxpayer the obligation to use its "best efforts" to secure a crane contract, and this was, in fact, Hike's understanding of the agreement. (R. 158.)^{5/} Thus, taxpayer's control over the delivery of the excursion boat was not "unrestricted."^{6/} Since a binding contract for the purchase and sale of the boat existed on December 7^{7/} 1971, an "order" must have been placed by that

5/ Indeed, had taxpayer failed to take any steps to obtain the crane contract, Hike would probably have been able to recover damages from taxpayer for breach of contract. Cf. Nichol v. Dixon, [1937] Ont. W. N. (No. 42) 677 (R. 138-139); Aldcrest Developments Ltd. v. Hunter, [1970] 2 Ont. 562 (R. 140-147).

6/ The example used in the House Report was as follows (H. Rep. No. 2087, supra, p. 31 (1966-2 Cum. Bull., p. 918) (September 8, 1966, marked the beginning of that particular investment credit suspension period):

For example on September 1, 1966, A enters into a contract to purchase specified machinery from B. Under the contract A's obligation to purchase is conditional upon his obtaining appropriate financing by November 1, 1966. The contract obligates A to use his best efforts to secure such financing. By November 1, 1966, A does in fact obtain the necessary financing. The condition does not prevent the agreement between A and B from being a binding contract.

7/ See Sections 1 and 2 of the Sale of Goods Act, Ont. Rev. Stat. (1970), c. 421 (R. 59-60), which provide in pertinent part as follows:

1.--(1) In this Act,

*

*

*

date. Indeed, it is difficult to understand how taxpayer could be vested with "Title to and property in the Vessel * * * from the signing of this contract" (R. 33) if it had not even "ordered" such vessel by that date.

2. Even assuming the December 16, 1971, contract was not technically binding at that time, the obtaining of the crane contract and the mailing of the \$3,000 check to Hike on December 18, 1971, unconditionally bound the parties to their agreement, as the Tax Court held. (R. 8-9.) By the terms of the December 16 letter, taxpayer was required to mail the \$3,000 check to Hike when the crane contract was obtained, and once that check was mailed, neither taxpayer nor Hike could prevent the contract from becoming effective. In other words, on December 18, 1971, Hike could not refuse to honor the contract for it could not prevent the postal service from delivering taxpayer's check; and taxpayer, by the terms of its letter, was obligated to send the check--i.e., "upon

7/ (continued):

- (c) "contract of sale" includes an agreement to sell as well as a sale;

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2.--* * *

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in goods is transferred from the seller to the buyer, the contract is called a sale, but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. * * *

the acceptance of that [crane] contract, the undersigned will forward to you the above-mentioned check." (R. 44.) (Emphasis supplied.) Thus, the contract between taxpayer and Hike became unconditionally binding on that date. In this regard see Saskatchewan Co-Op Wheat Producers, Ltd. v. Zurowski, [1926] 3 D.L.R. 810 (R. 77-131). In that case, the defendant agreed to join an agricultural cooperative to be formed by the plaintiff and to sell all of his wheat to it. The plaintiff, in turn, agreed to form the cooperative on the condition that he was able to convince a sufficient number of farmers to participate. The parties to the suit signed a written agreement incorporating these terms. But when his wheat was harvested, the defendant refused to sell it to the cooperative, on the ground, inter alia, that no valid contract existed because the plaintiff had not notified him that a sufficient number of cooperative participants had been obtained. The court, however, held that a binding contract existed, if not when the agreement was signed, then at least when the condition of obtaining sufficient participation was met, and that notification to the defendant of that fact was not necessary. Here, the signing of the crane contract on December 18, 1971, fulfilled the condition spelled out in taxpayer's letter to Hike. Consequently, a contract existed at that point. Since taxpayer was then required to send the \$3,000 check to Hike, Hike's receipt of the check can be viewed as merely notice that the condition had been met. However, as the court pointed out in Saskatchewan Co-Op, supra, the existence of a binding contract does not hinge upon the receipt of notification that a condition has been fulfilled.

3. In any event, taxpayer's actions in (1) executing a shipbuilding contract with Hike, (2) securing a crane contract, and (3) mailing the \$3,000 check to Hike--all of which occurred during the suspension period--constituted, at a minimum, a "directive * * * reasonably designed to effect the acquisition of property at a later date" (Treasury Regulations § 1.48-1(o)(2)(i)), and hence an "order" within the meaning of Code Section 48(a)(7). The very purpose in suspending the investment tax credit during the late summer and fall of 1971 was to discourage the purchase of all foreign-made goods and prevent the commitment of domestic capital to foreign sources by ordering goods to be purchased at a future date. Clearly, after the crane contract was secured and the \$3,000 check was mailed to Hike, there was nothing further taxpayer could have done to "effect the acquisition" of an excursion boat. Since the term "order" implies a unilateral act by the buyer only, the court below was correct in characterizing an order as an "unconditional offer to purchase." (R. 8.) As stated by the Supreme Court of Canada in Can. Atlas Engines v. McLeod Engines, [1952] 3 D.L.R. 513, Appendix B, infra, the term "order" means "a request from customers for delivery of * * * [goods]" (p. 524) (Judge Estey); "a direction to make, provide or furnish anything at the responsibility of the person ordering" (p. 537) (Judge Locke); or "a proposal in the nature of an offer which invites, without more, some form of acceptance intended to lead to an obligation" (p. 518) (Judge Rand, dissenting). See American Seed. Mch. Co. v. Commonwealth, 152 Ky. 589, 594,

153 S.W. 972, 975 (1913): "An order is merely an offer; * * * it is merely a request * * * [by the would-be purchaser] that * * * [the would-be seller] send him, sell him, or ship him, the goods desired." See also Webster's Third New International Dictionary (Unabridged, 1967), p. 1588, where the term "order" is defined as "a direction in writing to furnish supplies." Since all of taxpayer's actions to secure an excursion boat were completed by December 20, 1971, taxpayer plainly "ordered" such boat by that time, and, consequently, it is ineligible for the investment tax credit.

4. Taxpayer's basic position in this case (Br. 5-14) is that an "order" does not take place until there has been a sufficient commitment by a purchaser to a supplier to justify the supplier's generation of economic activity as a result of the purchaser's actions. In taxpayer's view, Hike would not have generated economic activity until it received taxpayer's check on December 21, 1971. This contention cannot be sustained.

In the first place, this so-called generation of economic activity test is not set forth anywhere in the statute, Regulations, or legislative history. It is merely one textwriter's opinion as to what the test "probably ought to be." See 192-3rd Tax Management Portfolio, p. A-32. The proper test, however, is the one specifically approved by Congress and set forth in the

applicable Treasury Regulations--i.e., an "order" is "a directive * * * reasonably designed to effect the acquisition of property at a later date." H. Rep. No. 2087, supra, p. 30 (1966-2 Cum. Bull., p. 917); Treasury Regulations § 1.48-1(o) (2)(i) (see pp. 8-9, ^{8/}supra). Here, the "directive" plainly occurred prior to December 20, 1971, since all of taxpayer's actions were completed by that date. Indeed, although taxpayer argues that an order did not occur until December 21, 1971--when there clearly was a binding contract--it concedes (Br. 5) that an "order" need not be a binding contract.

Moreover, taxpayer's narrow reading of the statute--under which an "order" would not be deemed to have been placed by the purchaser until received by the seller--would defeat the purpose of the suspension period. Not only would it enable some taxpayers to obtain the benefit of the investment credit, even though they had committed themselves to the purchase of foreign-made goods while the suspension period remained in effect, but it would also effectively deny the credit to others who had committed themselves to the purchase of such goods prior to the

8/ As noted by the Supreme Court in Commissioner v. South Texas Co., 333 U.S. 496, 501 (1948): "Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and * * * they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons."

effective date of the suspension period whenever the order was not received until after the Proclamation of August 15, 1971, was issued. Clearly, no such result was intended by Congress.

Finally, taxpayer's argument ignores that fact that on December 18, 1971--after the crane contract was obtained--taxpayer was required to send the check to Hike. At the same time, Hike had no choice but to accept the check and fulfill its obligations under the contract. Taxpayer's mailing of the check, therefore (and, indeed, the obtaining of the crane contract), was sufficient to "generate * * * economic activity" on the part of Hike, for the only condition to the performance of the contract obligations--i.e., determining the method of delivery--had been met on that date. Indeed, even if the crane contract had not been secured, and a new contract incorporating a different mode of delivery executed, the date that taxpayer placed its "order" would not have changed. See Treasury Regulations § 1.48-1(o)(2)(b):

Where an order placed during the surcharge period (August 16, 1971, through December 19, 1971) is canceled and a reorder is placed which is substantially the reinstitution of the original order, the property acquired as a result of the reorder is considered to be acquired pursuant to the original order.

CONCLUSION

For the reasons stated, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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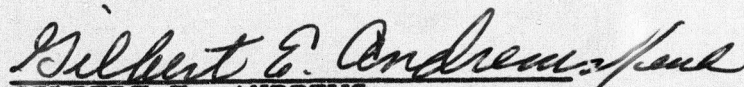
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AUGUST, 1978.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 18th day of August, 1978, in an envelope, with postage prepaid, properly addressed to him as follows:

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APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 48. DEFINITIONS; SPECIAL RULES.

(a) Section 38 Property.--

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(7) [as added by Revenue Act of 1971, Sec. 103, P.L. 92-178, 85 Stat. 97]: Property completed abroad or predominantly of foreign origin.--

(A) In general.--Property (other than pre-termination property) shall not be treated as section 38 property if--

(i) such property was completed outside the United States, or

(ii) less than 50 percent of the basis of such property is attributable to value added within the United States.

For purposes of this subparagraph, the term "United States" includes the Commonwealth of Puerto Rico and the possessions of the United States.

(B) Period of application of paragraph.--Except as provided in subparagraph (D), subparagraph (A) shall apply only with respect to property described in section 50--

(i) the construction, reconstruction, or erection of which by the taxpayer is begun after August 15, 1971, and on or before the date of termination of Proclamation 4074, or

(ii) which is acquired pursuant to an order placed on or before the date of termination of Proclamation 4074, unless acquired pursuant to an order which the taxpayer establishes was placed before August 16, 1971.

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Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.48-1 Definition of section 38 property.

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(o) Property of foreign origin--(1) In general. Property (other than pretermination property) shall not be treated as section 38 property if (i) such property was completed outside the United States, or (ii) less than 50 percent of the basis or cost of such property is attributable to value added within the United States. For purposes of this paragraph, the term "United States" includes the Commonwealth of Puerto Rico and the possessions of the United States.

(2) Period of application. (i) Subparagraph (1) of this paragraph shall apply only to property described in section 50--

(a) The construction, reconstruction, or erection of which by the taxpayer is begun after August 15, 1971, and before December 20, 1971, or

(b) Which is acquired pursuant to an order placed before December 20, 1971, unless acquired pursuant to an order which the taxpayer establishes was placed before August 16, 1971.

The principles of § 1.48-2(b) and (c) shall be applied in determining when construction, reconstruction, or erection by the taxpayer begins. An order is any directive, written or oral, to another person reasonably designed to effect the acquisition of property at a later date. An order need not be a binding contract. Where an order placed during the surcharge period (August 16, 1971, through December 19, 1971) is canceled and a reorder is placed which is substantially the reinstitution of the original order, the property acquired as a result of the reorder is considered to be acquired pursuant to the original order.

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APPENDIX B

CAN. ATLAS ENGINES v. McLEOD ENGINES [513]

of the validity of a marriage. I would therefore hold that the marriage in question was not invalid, and would dismiss the appeal."

In the result, I find that the British Columbia marriage in question was a valid marriage.

Petition dismissed.

CANADIAN ATLAS DIESEL ENGINES CO. LTD. v. McLEOD ENGINES LTD.

Supreme Court of Canada, Kerwin, Rand, Estey, Locke and Cartwright JJ. May 12, 1952.

Contracts II D—Evidence VI E—Agreement to supply engines to complete "orders"—Absence of formal purchase orders—Whether letters of request included in "orders"—Parol evidence to ascertain meaning contemplated by parties—

In an agreement for settlement of a dispute arising out of an overlapping agency territory, defendant agreed to supply plaintiff with "the necessary Chrysler engines to complete the orders shown on the attached sheet". No orders were actually attached thereto. A dispute subsequently took place as to the construction of the word "orders" in the agreement and in particular whether it extended to so-called "letters of essentiality" used in the securing of Government import permits for the engines. These letters appeared to be estimates made by customers of their requirements as to engines, and requests that the engines be delivered when required.

Held, by a majority, the letters of essentiality were not "orders" as provided in clear and unambiguous language by the contract. The term of the contract referring to orders had not been implemented by plaintiff producing any orders so as to require defendant to supply engines thereunder.

Per Locke J.: In the business of buying and selling goods the commonly accepted meaning of "order" is a direction to make, provide or furnish anything at the responsibility of the person ordering. No such orders were here produced by plaintiff.

Per Rand J. (Cartwright J. concurring) dissenting: There are commercial orders as distinguished from legal orders, behind both of which, until an obligation is created, stands the integrity of commercial commitments. Where a term such as "orders" is used in a contract the surrounding facts may, by showing the perspective in which the matters were viewed and what was in the minds of the parties, extend or modify its meaning. Here it is clear that the parties, who were business men, had in mind the substance of business relations, not the form of the language used to describe such relations. The term as here used included the letters of essentiality.

Cases Judicially Noted: *Frenkel v. MacAndrews & Co.*, [1929] A.C. 545; *Nat'l Bk. of Australasia Ltd. v. Falkingham & Sons*, [1902] A.C. 585; *Fowkes v. Manchester & London Life Ass'ce etc. Ass'n*, 2 B. & S. 917, 122 E.R. 343; *Hillas & Co. v. Arcos Ltd.*, 147 L.T. 503, *reid to*.

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APPEAL and cross-appeal from judgment of the British Columbia Court of Appeal, [1951] 2 D.L.R. 447, affirming trial judgment awarding plaintiff damages for breach of contract. Reversed; appeal allowed, cross-appeal dismissed.

Alfred Bull, Q.C., for appellant.

W. S. Owen, Q.C. and *F. Bonnell*, for respondent.

KERWIN J.:—I agree with my brothers Estey and Locke: The appeal should be allowed and the action dismissed with costs throughout to the appellant. The cross-appeal should be dismissed with costs.

RAND J. (dissenting):—This controversy is over the terms of an agreement involving the termination of an agency held by the respondents, McLeod Ltd., for the sale, in Victoria, British Columbia, of marine engines manufactured by the Chrysler Corporation of the United States. The appellants, Atlas Company, held a like agency for Vancouver and as Chrysler seemed disposed to extend the district of Atlas to include that of McLeod, the latter, who had exercised the agency for about 2 years against Atlas' fourteen or more, decided to surrender on the best terms obtainable. The parties, including a representative of Chrysler met first in Seattle, later in Vancouver and finally in Victoria, and their agreement is to be deduced from letters to which reference will now be made.

The first communication is from Atlas to McLeod at Vancouver, on January 26, 1949, and the material portions are:

"Canadian Atlas Diesel Engine Co. of Vancouver, B.C., agrees to buy from McLeod Engines Ltd., all their stock of Chrysler marine engines, Chrysler marine parts, and marine accessories; also one Dodge service truck . . .

"It is further agreed that Canadian Atlas Diesel Engine Co. will supply to McLeod Engines Limited the parts necessary to complete engines now being overhauled at Begg Brothers Limited. These parts to be supplied at cost.

"It is further agreed that Canadian Atlas Diesel Engine Co. will supply McLeod Engines Limited with the necessary Chrysler engines to complete the orders shown on the attached sheet.

"All merchandise purchased will be first-class condition and at actual cost.

"The above is agreed to when mutual termination of Chrysler marine franchise in the Province of British Columbia is negotiated."

The second, from McLeod to Atlas, dated, at Victoria, on January 27th, reads:

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"As agreed in our meeting yesterday, we are listing below orders we have on hand, and in the other column, number of engines that have been delivered against these orders. You will see the orders number one hundred and twenty-four and the deliveries fifty, which will leave us seventy-four to be delivered." and is followed by an enumeration of ten fishing companies showing a total of 124 engines ordered and fifty delivered.

The last is dated January 31st at Victoria from Cunnings on behalf of Atlas to Alger, Sales Manager of Atlas, with a copy to McLeod:

"Canadian Atlas Diesel Engines Limited has agreed to supply engines to the above company to make deliveries on the list of sales now in our hands at our actual cost, plus \$30.00 to cover our cost of handling. All engines are to be started in our shop to insure engines being in proper mechanical condition at time of delivery.

"McLeod Engines Limited will issue purchase request with shipping instructions for each engine, and will also issue payment for same direct to Canadian Atlas Diesel Engines Limited.

"The matter of fishermen's rebate will be worked out between Mr. Evans and McLeod Engines Limited."

As is seen, the first letter speaks of "the orders shown on the attached sheet"; the same word "orders" is used in the letter of January 27th; and that of January 31st refers to "the list of sales now in our hands".

It appears that on April 16, 1948, Regulations had been passed by the Dominion Government under c. 7 of the Statutes of Canada, 1948, dealing with exchange controls between Canada and the United States, imposing restrictions on the importation of goods from that country. To enable these engines to be brought into Canada, it was necessary to satisfy the Department that there was a commercial need for them here. This led to the requirement of evidence of "essentiality" before import permits would be issued.

In accordance with this requirement, McLeod in the autumn of 1948 obtained letters from customers estimating their needs for the fishing season of 1949, and intimating that it would be expected and certainly desirable that the engines should be available for delivery when wanted. Decision on the applications was said to have taken up about 2 months and the certificates were received by McLeod either toward the end of the year or early in January, 1949.

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A representative letter of "essentiality" is that from Canadian Fishing Companies Ltd. to McLeod dated October 7, 1948:

"After a careful review of our probable engine requirements over the next several months, we estimate that we will need approximately twenty Chrysler Crown and Chrysler Ace Engines, with 2½ to 1 reduction gears.

"The above engines are to be used as power plants for commercial fishing vessels, used exclusively in the commercial fisheries of British Columbia.

"We sincerely trust that you will be able to make delivery of these engines when required. Thanking you."

As these letters were solicited by McLeod, they have a general uniform tenor and phraseology, but they were solicited in the regular course of McLeod's business and before any question of the cancellation of the agency arose.

The ground of Mr. Bull's argument is precise and narrow: these letters are not "orders" within the meaning of the word: the obligation is to supply engines only in fulfilment of genuine "orders"; and Atlas were justified in refusing to meet requests of McLeod for delivery. The question is whether that contention is valid.

It should first be made clear that there was no intention on the part of McLeod to misrepresent; they have been acquitted of acting otherwise than in good faith. They must then be taken as believing that what had been received from the companies established a relation embraced within the meaning of the word "orders" as used in the correspondence quoted.

The originals of the letters had been sent to Ottawa and kept there, and copies had not been retained. When consequently at the meeting in Victoria inquiries were made about them all that could be produced were the permits for importation, of which the following is a sample:

"TO THE DEPARTMENT OF TRADE AND COMMERCE,
EMERGENCY IMPORT CONTROL BRANCH
APPLICATION TO IMPORT CAPITAL GOODS

INSTRUCTIONS ON THE BACK MUST BE STRICTLY OBSERVED

Applicant's Name — McLeod Engines Limited
Address—1221 Wharf St., Victoria, B.C.
Date—October 18th./48

"The undersigned hereby makes application for a permit to import the goods, articles or commodities described hereunder, in respect of which the information furnished herein is certified to be true and correct.

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No. of Pkgs.	Quantity	Description of Goods	Value in Canadian Dollars
15	15	Chrysler Crown Marine Engines ..	\$10,500.00
15	15	Chrysler Ace Marine Engines	9,900.00
			\$20,400.00

"INSTRUCTIONS

"To be observed in the Preparation and Completion of an Application for Permit to Import

"3. Applications can be considered only when:—

.....

"(b) this application is accompanied by a separate declaration of essentiality. This declaration must provide details as in (i) (ii) (iii) (iv) below and be signed by the end user of the goods or a senior member of his organization.

"(i) why purchase cannot be deferred until the current foreign exchange situation is corrected; and

"(ii) why the importation is absolutely essential, giving full reasons with supporting evidence; and

"(iii) what steps have been taken to obtain the items from Canadian production sources; and

"(iv) could the equipment be imported for temporary use and returned."

Atlas deny knowledge of the practice in obtaining permits as they had been granted a quota of importation against which, however, their imports would be charged unless they could procure an exemption by showing that an imported machine was to be used for essential purposes. This would be to furnish the same justification as for a permit to import.

The trial Court held that the contract binds Atlas to supply the 74 engines specified in the list as stated in the letter of January 31st, and I agree that it does so. On that footing, and assuming Mr. Bull's contention to be well founded, it can be said to have been made, on the part of McLeod, under a mistaken notion that the letters of essentiality were within the word "orders"; and on the part of Atlas to have been induced by the misrepresentation of McLeod as to their nature. In view of the impossibility of rescission and the completely executed consideration moving from McLeod, however, the only issues now open would be fraud and warranty. The former has been disposed of by the vindication of McLeod; the latter must arise as a conclusion of intention to be drawn by the Court from the

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letters, but I see nothing in them, read in the light of the circumstances, that would justify that. There was no reason to affirm when there was no question of what was in mind or of any undisclosed matter. Atlas was willing to supply 74 engines, and the technical difference between orders and what the letters involved was not of such a nature as would deprive Atlas of something of which it sought assurance.

That would be sufficient to dispose of the appeal; but as I have come to the conclusion that the word "orders" as used embraces the commercial commitments contained in the letters, I think it desirable to base myself on that ground as well as on the former.

Strictly speaking, an order, in law, is a proposal in the nature of an offer which invites, without more, some form of acceptance intended to lead to an obligation; that acceptance, according to the nature of the order, may be by promise or by some act as, say, the delivery of goods to a carrier. The letters of essentiality here do not go to that length; they do not of themselves alone contemplate an acceptance; but they are *bona fide* estimates of an approaching season's requirements by a customer to a seller which look to subsequent directions for shipment of the goods mentioned. They imply an assurance that such directions will be given, and exhibit that assurance as a representation to the Department of Government concerned. They did not, from that moment, in a legal sense, bind the companies, but neither would they had they been orders in the strict sense; before acceptance, an order can be revoked and an outstanding revocable order would admittedly satisfy the language used.

Could Atlas have believed that that considerable share of the business in such engines for the approaching season would have been specified otherwise than by such an estimate so far in advance, particularly when there had been placed before them and perused all of the importation permits but one which, as explained to them, was at the Customs Office? Proctor of Chrysler who inspected the permits with Cunnings of Atlas was familiar with the regulations and the necessity for the letters; in the whole of the negotiations, he played a leading part in relation to all terms of the contract, on behalf of Atlas as well as Chrysler, and his knowledge must be imputed to Atlas. That is particularly so in relation to the permits, since Cunnings, at the time, in the presence of Proctor, stated his lack of familiarity with the import procedure and the discussion of this feature proceeded on the basis of Proctor's acquaintance with it. In November, 1948, Proctor had visited McLeod in Vancouver and in the words of F. B. McLeod, "approved of the orders we had taken."

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Atlas, in co-operation with Chrysler, were in effect driving McLeod out of the market; with the list before them they were willing, so far as numbers went, that the requirements of McLeod's customers for the coming season be fulfilled by that company. It could not but have been seen that the latter had obtained some form of assurance from their customers covering the season's supply. A commercial obligation equal to a revocable order was represented: did that in fact exist? Undoubtedly it did. In the ordinary course of business there would be no less dependability supporting the representation of the letters than an order; they were in effect commercial orders as distinguished from legal orders, behind both of which, until an obligation is created, stands the integrity of commercial commitments.

What, then, in all the circumstances did the understanding at Victoria on this feature come to? Atlas and Proctor were well acquainted with the business of the British Columbia coastal fisheries. They knew that the list which they received gave directly not the then outstanding orders but rather the total orders and the number up to that time filled; and they knew that the totals shown represented the season's requirements of the companies named. Atlas clearly meant to stop short of disrupting business relations established by McLeod. The permits satisfied them of the good faith of McLeod and of the existing commitments, and it was not until around March 20th following that any demand for evidence of original "orders" was called for.

For these reasons, I must reject Mr. Bull's contention. Commercial words, in any context, must take their meaning from the body of circumstances to which they are related and out of which they arise; and although the golden rule is that, subject to well-known qualifications, the ordinary and grammatical meaning of language used is to be taken as intended, nevertheless in the use of such a term as that here in question, a sufficiency of significant surrounding facts may, by showing the perspective in which the matters were viewed and what matters of fact were actually in the minds of the parties, extend or modify its scope.

As Lord Wright in *Hillas & Co. v. Arcos Ltd.* (1932), 147 L.T. 503 at p. 514 expressed it:

"This [i.e., the true construction of a document] is a question of law on which evidence is not relevant, except to the extent clearly stated by Lord Dunedin in *Charrington and Co. Limited v. Wooder* (110 L.T. Rep. 548, at p. 511; [1914] A.C. 71, at p. 82), where the words 'fair market price' were to be construed:

" 'Now, in order to construe a contract the court is always

entitled to be so far instructed by evidence as to be able to place itself in thought in the same position as the parties to the contract were placed, in fact, when they made it, or, as it is sometimes phrased, to be informed as to the surrounding circumstances. As Lord Davey says in the case of *Bank of New Zealand v. Simpson* (82 L.T. Rep. 102, at p. 104; [1900] A.C. 182, at p. 188), quoting from a decision of Lord Blackburn's: "The general rule seems to be that all facts are admissible (to proof) which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used." "

And Lord Tomlin at pp. 511-12:

"Commercial documents prepared by business men in connection with dealings in a trade with the workings of which the framers are familiar often by reason of their inartificial forms confront the lawyer with delicate problems.

"The governing principles of construction recognised by the law are applicable to every document, and yet none would gainsay that the effect of their application is to some extent governed by the nature of the document.

"On the one hand the conveyance of real estate presenting an artificial form grown up through the centuries and embodying terms of art whose meanings and effect have long since been determined by the courts, and on the other hand the formless document, the product of the minds of men seeking to record a complex trade bargain intended to be carried out, both fall to be construed by the same legal principles, and the problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."

The contract must be construed as a whole: and an undue emphasis upon a word or a phrase may easily distort that balanced understanding which can be seen to have been the crystallized consensus. The expression "the list of sales now in our hands" indicates the generality of the notion of Cunnings and emphasizes the fact that these business men had in mind the substance of business relations, not the precision of language.

McLeod had been very successful as agents and as late as December Proctor had told them it looked as if they would be given the agency for the Province. In that situation, with the knowledge of Proctor of the letters as "orders", Atlas cannot now be heard to say that the contract means such items only as may be "orders" as they understand the word. Their intention,

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in introducing this element of fairness into the proceedings, was to leave intact the body of business McLeod had actually negotiated for the season: and the word as used was intended to describe that.

On the cross-appeal I am unable to find in the record sufficient evidence to support the claim for damages for loss of profits on the prospective sales of accessories, as pleaded, and I am in agreement with the conclusion of the majority of the Court of Appeal on this branch of the matter also.

For these reasons the appeal and the cross-appeal must be dismissed with costs.

ESTEY J.:—The issues in this appeal are largely determined by the construction of the word "orders" in the contract made between the parties hereto dated January 26, 1949. The respondent would, but the appellant would not, give to this word a construction sufficiently comprehensive to include the letters styled letters of essentiality obtained by the respondent from its customers. The learned trial Judge and the majority of the Court of Appeal, [[1951] 2 D.L.R. 447], Sidney Smith J.A. dissenting, have found in the respondent's favour.

The relevant portions of the contract read as follows:

"HOTEL VANCOUVER
Vancouver, B.C.
January 26th, 1949.

"McLeod Engines Limited,
1221 Wharf Street,
Victoria, B.C.
Gentlemen:

"Canadian Atlas Diesel Engine Co. of Vancouver, B.C., agrees to buy from McLeod Engines Ltd., all their stock of Chrysler marine engines, Chrysler marine parts, and marine accessories; also one Dodge service truck. . . .

"It is further agreed that Canadian Atlas Diesel Engine Co. will supply McLeod Engines Limited with the necessary Chrysler engines to complete the orders shown on the attached sheet. . . .

The above is agreed to when mutual termination of Chrysler marine franchise in the Province of British Columbia is negotiated.

"Yours very truly,
CANADIAN ATLAS DIESEL ENGINE CO. LTD.
per: A. G. Cummings"

This contract was written by representatives of both parties in Vancouver and the following day, at Victoria, the attached

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sheet was prepared and annexed thereto. The attached sheet reads:

"1221 Wharf Street
Victoria, B.C.
January 27th, 1949

"Mr. A. G. Cunnings,
Canadian Atlas Diesel Co.,
1859 West Georgia Street,
VANCOUVER, B.C.

Dear Sir:

"As agreed in our meeting yesterday, we are listing below orders we have on hand, and in the other column, number of engines that have been delivered against these orders. You will see the orders number one hundred and twenty-four and the deliveries fifty, which will leave us seventy-four to be delivered.

<i>Name</i>	<i>Orders</i>	<i>Delivered</i>
B. C. Packers Ltd.	30	7
Nelson Bros. Fisheries	15	—
Canadian Fishing Co.	20	6
A.B.C. — North Pacific	30	25
A. B. C. — Phoenix	13	6
R. Cosulich Boat Wks.	4	2
Fred Radler	2	—
Pete Sather	1	—
Kyuquot Trollers	7	3
S. Hansen	2	1
Total	124	50

"Yours very truly,
MCLEOD ENGINES LTD.
President.

1-27-49

Rec'd copy

A. G. Cunnings

FBM/ea"

The terms of this contract, other than providing for the delivery of the engines as set out in the second of the above-quoted paragraphs, have been performed.

The parties hereto, prior to January 26, 1949, under contracts with the Chrysler Corporation of Detroit, Mich., sold marine engines and accessories in separately defined areas in British Columbia. These Chrysler engines had to be imported

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from the United States. Parliament, in 1948, enacted the *Emergency Exchange Conservation Act* (c. 7), and under the provisions thereof the Governor-General in Council passed Regulations and thereafter these engines could only be imported upon compliance therewith. This Act and the Regulations thereunder came into force on April 22, 1948.

The respondent in order to comply with the foregoing Regulations and have engines available as and when its customers might require them, interviewed and obtained from them, in the fall of 1948, letters that in these proceedings have been styled letters of essentiality. These letters it forwarded to Ottawa, together with such orders as it had on hand, in support of its application for importation permits, and when these were received it imported the engines. The original letters of essentiality were retained at Ottawa. They are similar in phraseology and, while copies of five were placed in evidence, that of October 7, 1948, from the Canadian Fishing Company Ltd., is typical:

"Dear Sirs:

"After a careful review of our probable engine requirements over the next several months, we estimate that we will need approximately twenty Chrysler Crown and Chrysler Ace Engines, with 2½ to 1 reduction gears.

"The above engines are to be used as power plants for commercial fishing vessels, used exclusively in the commercial fisheries of British Columbia.

"We sincerely trust that you will be able to make delivery of these engines when required. Thanking you."

The respondent's customers, in these letters, appear to do no more than to estimate their engine requirements in fishing operations, in order that they may assist the respondent in importing the engines and having them on hand as and when they might require them. The language contained in the letter from the British Columbia Packers Ltd. makes this particularly clear, as it states: "We hope this letter will assist you in being able to have engines available for our requirements." The respondent, however, contends that even if these letters be unambiguous upon their face that, having regard to the existence of the Regulations, the knowledge thereof by the respective parties, the conversations at Victoria on January 27th, the contents of the appellant's letter of instructions dated January 31st and the delivery of 14 engines upon the requisitions specified in that letter, a latent ambiguity is raised that justifies the examination of the surrounding circumstances to

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determine the intent and meaning of the word "orders" as used by the parties in this contract. The evidence adduced supports this contention. In *Frenkel v. MacAndrews & Co.*, [1929] A.C. 545, where the Court construed the word "route", Lord Warrington of Clyffe, at p. 567, said:

"It is well settled that if the surrounding circumstances raise a latent ambiguity in any of the expressions used, parol evidence may be resorted to for the purpose of ascertaining which of the meanings of an ambiguous expression was contemplated by the parties." See also *Charrington & Co. v. Wooller*, [1914] A.C. 71, and *Bk. of New Zealand v. Simpson*, [1900] A.C. 182.

This, however, does not permit the reception in evidence, as at the trial hereof, of declarations from representatives of the customers, setting forth their intention with respect to the meaning and purport of these letters. That intention, as in written instruments generally, must be determined by the Court upon a construction of the language adopted by the parties to express their intention: *Nat'l Bk. of Australasia Ltd. v. J. Falkingham & Sons*, [1902] A.C. 585.

The negotiations commenced in Seattle on January 24, 1949, between Proctor of the Chrysler Corporation, Cunnings of the appellant and McLeod and Bramston of the respondent. Proctor informed McLeod that his corporation was enlarging the area of the appellant's franchise in British Columbia. This, as realized by all parties, adversely affected the respondent's position as vendor of Chrysler engines. Certain alternatives were discussed, but no agreement was arrived at when, on the evening of the 25th, the parties motored to Vancouver. There, the next day, an agreement was concluded and its terms embodied in the letter of January 26, 1949, to which the attached list was appended, at Victoria, on the following day.

The learned trial Judge, wherever there was a conflict, accepted the evidence of McLeod and Bramston, as against that of the appellant's witnesses. He, however, did not have an opportunity to observe the demeanour of Proctor, whose evidence was taken upon commission in California.

Throughout the negotiations and in the contract both parties apparently used the word "orders" in the ordinary, accepted sense of a request from customers for delivery of engines. McLeod made this clear when he stated in the attached sheet: "We are listing below orders we have on hand." He also deposed to the same effect when he stated that he had the engines "sold" by virtue of these letters. McLeod does not dispute

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this. In fact he does not contend otherwise, his position being, throughout, that respondent accepted these letters as orders in that sense.

The respondent emphasized that the appellant was aware of the Regulations and that it should be concluded therefrom that it was familiar with these letters of essentiality. Both parties hereto were well aware of and complied with the Regulations, though under quite different provisions thereof. The respondent followed the practice of obtaining importation permits, while the appellant was granted a quota under these Regulations. There is, however, no evidence to justify the conclusion that the appellant's officers and agents had any knowledge of either the existence or the contents of these letters of essentiality at the time of the execution of the contract, or, indeed, at any time prior to this litigation.

The evidence, however, clearly establishes that Cunnings was to inspect the orders and justifies the inference that he would do it at the time of or before the preparation of the list. McLeod himself deposed that because he did not have either the orders or particulars thereof at Vancouver he "couldn't give them adequate information So it was decided to meet in Victoria the following day" in order that Cunnings and Proctor might "take a look at the stock they had bought, also to check our orders and make the attached list."

McLeod, as respondent's manager, had forwarded the letters of essentiality to Ottawa, where he knew they were retained and only the importation permits forwarded to respondent. He therefore, in Vancouver, when it was arranged for the inspection of the orders next day in Victoria, knew they were not there and could not, therefore, be inspected. Indeed, so far as the evidence discloses, the importation permits in his possession did not evidence the existence of permission to import 74 engines. Moreover, McLeod did not disclose from what records in respondent's office at Victoria he prepared the list of orders. He merely stated that he had done so and that it was being typed when Proctor and Cunnings arrived at respondent's office. When finished, he presented it to them and he says that Bramston and Cunnings looked it over, as well as the importation permits which were on the desk, and Cunnings "signed it as having received it and being satisfied with it". This statement goes quite beyond what Cunnings subscribed to; as the list discloses, and is inadmissible to alter, vary or contradict the writing.

That some discussion must have taken place with regard to

these orders at Victoria is evident from McLeod's admission that "we explained to them some of those orders had gone — practically all had gone to Ottawa to secure the permits". Moreover, Bramston, in giving his evidence as to what took place in Victoria, states that Cunnings "asked for a copy of the orders on hand" and goes on to explain that there was some discussion as to these orders which had gone to Ottawa and that Proctor and Cunnings were shown the importation permits. While Bramston says they did not ask for further information, he does not go so far as to say they accepted the importation permits in lieu of the orders. Bramston's evidence upon this point is consistent with his conduct before both Evans and Cunnings when he was refused delivery at first of five engines and later of one engine. When Evans refused the delivery of the five, Bramston, upon his own evidence, made no comment. He did, however, immediately consult with McLeod and forthwith wrote a letter enclosing the requisitions for the five engines and stating that appellant had, in the letter of January 26th, agreed to deliver "Chrysler marine engines as schedule on attached list". When later, on March 16th, Cunnings refused, he did not even press upon him that point of view. This further emphasizes the significance of the difference between the evidence of McLeod and Bramston as to the discussion at Victoria relative to the production of the orders.

The importation permits upon the desk authorized the importation of 47 engines. McLeod explained there was another permit at the Customs for 20 engines, of which four had already been delivered. Upon McLeod's own evidence they disclosed an authority to import only 53 engines. When it is remembered that these were all business men, it seems difficult to conclude that Cunnings, who had insisted on seeing the orders for 74 engines, should accept such evidence as satisfactory proof of the existence of 74 orders. Moreover, upon the whole of this evidence, Cunnings was denied the inspection of the orders and under these circumstances a conclusion that he accepted an alternative that did not disclose the nature and character of the suggested orders ought to be drawn only where the evidence unequivocally supports that conclusion. Such evidence is not here present. The position might well have been otherwise had Cunnings been shown a copy of the orders, or had their contents been fully explained to him.

McLeod's appreciation of the difference between letters of essentiality and orders is evidenced by his statement

"In some cases we had an order as well, and it was also at."

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tached to the application along with that letter of essentiality."

And later:

"In some cases we had an order along with the letters of essentiality, if so, we included it with the application but it wasn't strictly necessary because if we didn't have the complete description of the engine they went through just the same."

If, in these circumstances, McLeod intended the estimated requirements made in the letters of essentiality to be accepted as orders within the meaning of the contract, he should have either exhibited one of the letters, a copy thereof, or made such explanation of their contents as would have enabled the appellant's representatives to understand the word "order" in the sense in which he desired it to be understood. McLeod's failure to do so has created the issue here raised and justifies the application of the rule stated by Blackburn J. in *Fowkes v. Manchester & London Life Ass'ce etc. Ass'n* (1863), 3 B. & S. 917 at p. 929, 122 E.R. 343: "The language used by one party is to be construed in the sense in which it would be reasonably understood by the other."

Respondent submits that the appellant's letter of January 31st, written by Cunnings after the contract was concluded, supports its view that the orders were not to be produced, but that 74 engines were to be delivered in accordance with the terms thereof. This letter reads as follows:

"A. G. Cunnings—Terminal Island

J. C. Alger—Vancouver

January 31, 1949.

c.c. Mr. W. H. Stephenson—Oakland

Mr. E. Evans—Vancouver

Mr. Fred McLeod—McLeod Engines Limited, Victoria,
B.C.

McLEOD ENGINES LIMITED

"Canadian Atlas Diesel Engines Limited has agreed to supply engines to the above company to make deliveries on the list of sales now in our hands at our actual cost, plus \$30.00 to cover our cost of handling. All engines are to be started in our shop to insure engines being in proper mechanical condition at time of delivery.

"McLeod Engines Limited will issue purchase request with shipping instructions for each engine, and will also issue payment for same direct to Canadian Atlas Diesel Engines Limited.

"The matter of fishermen's rebate will be worked out between Mr. Evans and McLeod Engines Limited.

"A. G. Cunnings"

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The respondent emphasizes not only that in this letter there is no suggestion of any obligation to disclose its orders, but that rather there is a positive assertion that the appellant will "supply engines . . . to make deliveries on the list of sales", as well as the direction that respondent "will issue purchase request with shipping instructions", which letter was followed by the delivery of 14 engines in accordance with the terms thereof. The appellant, on the other hand, submits that McLeod had led them to believe the engines were sold, and with this McLeod agrees, and, with that in mind, Cunnings used the word "sales" in his letter of instructions. This letter does not cover all of the points agreed upon regarding the delivery of these engines; *e.g.*, it does not refer to the fact that these engines were to be paid for, as in fact, they were, upon delivery. Moreover, Cunnings does not state in his evidence that the orders were to be shown along with, or at the time of, the requisition. It is further significant that throughout all the evidence it is never suggested that the respondent should surrender the orders to the appellant and, therefore, the purchase request with the shipping orders would be the only record upon which the appellant would make the delivery and from which it would make whatever record it deemed necessary in relation thereto. It was the latter that was evidently uppermost in Cunnings' mind as he wrote this letter, and, having regard to all of these factors, it cannot be said that this letter necessarily supports the affirmative conclusion that the appellant accepted in Victoria the letters of essentiality as orders, or, as suggested at the hearing, he accepted as the appellant's obligation to deliver 74 engines to the respondent.

With respect to the 14 engines delivered, Evans, who received the requisition and delivered the orders, states that on two or three occasions he had asked Bramston to show him the orders; that Bramston had not done so and, in fact, had made no reply to his request. Bramston, who gave his evidence first, was not asked as to this conversation and was not recalled and questioned in regard thereto. However, on March 2nd Evans did refuse to deliver to Bramston five engines. Bramston at that time made no protest to Evans, but immediately communicated with McLeod.

McLeod, as a result of Bramston's communication, did some long-distance telephoning, apparently with Proctor and perhaps others, and, as a result, Cunnings directed the five engines to be delivered and said that he would "be up in Vancouver". In respect to the whole 19 delivered Cunnings deposed: "I knew I was coming back up to Vancouver in the near future and I

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thought I would be able to get things straightened out when I returned here, and as I had made the arrangement originally I didn't want our Vancouver office personnel to get mixed up in it."

On March 16th Bramston presented a requisition and a cheque for a further engine. Cunnings was in Vancouver and personally refused the delivery of that engine. There is some discrepancy as to the exact language used. Bramston says Cunnings merely expressed regret that he could not provide the engine and that he himself made no comment, but withdrew immediately. Cunnings, on the other hand, states that he told Bramston he would give him the engine if he produced the order; that Bramston withdrew and he thought he would return, but he never did. Thereafter the matter was dealt with through the solicitors for the respective parties.

That 19 engines were delivered without the production of the orders is admitted. The respondent urges that this supports its contention that the orders were not to be produced. Appellant's position is that Cunnings permitted the delivery of the 19 engines in reliance upon McLeod's word that the orders would be submitted. When the orders were not submitted Cunnings apparently concluded that, as he himself had conducted negotiations, he would, when in Vancouver, personally insist on the production of the orders. This is consistent with the appellant's contention throughout that it would deliver the engines if orders therefor were produced by the respondent. There can be no question but that the parties agreed upon this on January 28th at Vancouver and the solicitors' letter written on behalf of the appellant to respondent on March 18, 1949, stated: "Our clients take the position that they are only obliged to deliver to you under the special arrangement, subject to proper payment therefor, engines for which you can produce firm written orders dated January 26, 1949, or prior thereto." Under these circumstances the delivery of the 19 engines does not assist in determining the issues here raised.

The evidence throughout does not support the respondent's contention. The letters, as phrased, were estimates of customers' requirements and not orders for engines to be delivered in the future. An examination of the surrounding circumstances supports that construction. The fact that McLeod construed these letters as orders does not resolve the matter. More important is that, if he intended them as such, having regard to their contents, he should have disclosed it, or made their contents known

to the appellant in such a manner that it would have understood the respondent's meaning and intention.

The respondent's contention that a change was effected at Victoria, under which these orders were not to be produced, is in conflict with the endorsement made by Cunnings upon the list. If such a change had been effected it would have been of even greater or at least of equal importance to that of the acknowledgment of the receipt thereof and one would have expected that it would have been included in the endorsement. It is also in conflict with respondent's letter of March 2nd. This letter was written to appellant after Evans refused the delivery of the five engines to Bramston. The latter immediately communicated with McLeod and, as a consequence thereof, wrote the appellant enclosing the five requisitions and requesting delivery "under terms of your letter of January 26th, 1949, which specifies that your Company, Canadian Atlas Diesel Engines Ltd. shall deliver our company, McLeod Engines Limited, Chrysler Marine Engines as schedule on attached list". The respondent, therefore, as late as March 2nd, was relying upon the contract as made at Vancouver on January 26th under which McLeod had agreed the orders would be inspected.

Moreover, the evidence of McLeod and Bramston, quite apart from the endorsement made by Cunnings on the attached sheet and the letter of March 2nd, does not justify a conclusion that any such change was agreed upon. The subsequent letter of instructions and the delivery of the 19 engines is as consistent with the appellant's reliance upon the subsequent submission of the orders as with the contention of the respondent.

The evidence, as a whole, justifies the conclusion that the parties negotiated and concluded the contract at Vancouver under which the appellant would purchase the stock on hand and deliver to the respondent the engines for which it held orders. At that meeting the respondent was not in a position to give the particulars of the orders and it was agreed that they would be inspected the next day. This vital term of the contract has never been implemented by the respondent and nothing that took place at Victoria or thereafter justifies a conclusion that the appellant had accepted anything in lieu thereof.

The Court of Appeal varied the judgment of the learned trial Judge by deleting an item in the damages. Respondent cross-appealed to this Court with respect to that item. In view of the conclusions arrived at, it is unnecessary to deal therewith.

The appeal is allowed, the cross-appeal dismissed and the action dismissed with costs throughout to the appellant.

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LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia [[1951] 2 D.L.R. 447] which, by a decision of the majority of its members, affirmed the judgment for damages awarded to the respondent at the trial. Sidney Smith J.A. dissented and would have dismissed the action.

While it is sufficient, in my opinion, for the determination of the appeal to decide whether the documents referred to in the proceedings as "letters of essentiality" were orders within the meaning of that expression as used in the agreement evidenced by the letter written by the appellant to the respondent dated January 26, 1949, in view of the claim for the rectification of the agreement in the counterclaim and of the course of the trial, it is necessary to review the evidence as to the events leading up to the making of the agreement and as to what occurred immediately thereafter.

By an agreement dated July 19, 1948, made between the Chrysler Corporation and the respondent, the latter was granted the right to sell Chrysler Marine Engines, parts and accessories in the Cities of Victoria and Prince Rupert. The term of this agreement was for one year but it was provided that either party might terminate it by written notice to be given in a defined manner. The appellant company, by agreements dated respectively April 9, 1947, and January 3, 1949, was granted similar rights in the Districts of Vancouver and Westminster. By the *Emergency Exchange Conservation Act* restrictions were imposed upon the importation of certain goods into Canada, these including Diesel Engines of the type supplied by the Chrysler Corporation to both parties from the United States. Permits allowing the importation of such goods might be obtained on application to the Minister of Trade and Commerce in a manner thereafter prescribed by Regulations made by the Governor in Council. In practice, under these Regulations, prospective importers of goods from the United States were required to satisfy the Minister that the goods sought to be imported were required for some purpose approved by him. In the present matter the only market with which the parties were concerned was the sale of engines for use in the fishing industry, a purpose apparently regarded by the Minister as one for which importation should be permitted.

In the fall of 1948 the respondent took steps to obtain such engines as it might expect to require for its business in British Columbia during the year following. On August 14, 1948, it obtained a letter from a company engaged in the fishing and

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fish packing industry, Nelson Bros. Fisheries Ltd., reading as follows:

"After a careful study of Chrysler Engines which we will require for the 1949 Season, we estimate that we will need ten (10) Chrysler Crowns and five (5) Chrysler Ace Engines with $2\frac{1}{2}$ to 1 reduction.

"We trust that you will be able to make delivery of these engines, as required, during the Spring of 1949."

By letter dated October 7, 1948, the Canadian Fishing Co. wrote to the respondent giving its estimate of the number of Chrysler engines it would require in the next several months as being approximately 20 Chrysler Crown and Chrysler Ace engines with $2\frac{1}{2}$ to 1 reduction gears, saying that they were to be used as power plants for commercial fishing vessels used exclusively in the commercial fisheries of British Columbia, and concluding: "We sincerely trust that you will be able to make delivery of these engines when required."

On October 8, 1948, British Columbia Packers Ltd. wrote to the respondent saying that its estimated requirements of Chrysler engines for the 1949 season were approximately 30 engines, of which 15 would be Chrysler Aces and 15 Chrysler Crowns with $2\frac{1}{2}$:1 reduction gears, and concluding: "We hope this letter will assist you in being able to have engines available for our requirements."

By letter dated October 13, 1948, the Anglo-British Columbia Packing Co. Ltd. advised the respondent that during the course of the next six months it would require three Chrysler Crown engines with reductions and ten Chrysler Aces with reductions, that the engines would be used exclusively for their own fish boats and their fishermen's boats, concluding: "Trusting you will be in a position to deliver these engines as required."

By letter dated October 21, 1948, Kyuquot Trollers Co-Operative Ass'n informed the respondent that it had made a survey of its probable Chrysler marine engine requirements during the next few months and estimated that seven would be needed and, in addition to certifying that the engines would be used only to propel the commercial fishing boats of its fishermen, said: "We trust you will be in a position to deliver these engines to us as needed during the present season."

The letters from the British Columbia Packers Ltd. and Nelson Bros. Fisheries Ltd. were accepted as sufficient by the Emergency Import Control Branch of the Department of Trade and Commerce and permits to import 45 Chrysler engines for

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the purpose of resale to these companies were issued on December 2, 1948. Two other permits, each for one Chrysler marine engine, granted for resale to two commercial fishermen were issued on December 15th and December 20th respectively. The documents obtained from these prospective purchasers for the purpose of obtaining the permits were not produced at the trial.

On January 24, 1948, F. B. McLeod, president of the respondent company, met R. H. Proctor, the West Coast divisional manager for the Chrysler Marine and Industrial Engine Division of the Chrysler Corporation at Seattle, at the latter's request. Questions had arisen between the parties to this action as to their respective selling rights on the Pacific Coast and it had apparently been decided by the Chrysler Corporation that these differences should be composed. A. G. Cunnings, the manager of the Chrysler Marine & Industrial Engine Division of Atlas Imperial Diesel Engine Co., an American corporation of which the appellant is a subsidiary, took part in the discussions which were continued on the following day at a hotel in Vancouver. In the result, the respondent company agreed to surrender its Chrysler franchise and sell its stock of Chrysler engines and accessories to the appellant on terms which were defined in a letter written by the appellant to the respondent, reading as follows:

"HOTEL VANCOUVER
Vancouver, B.C.
January 26th. 1949.

"McLeod Engines, Limited,
1221 Wharf Street,
Victoria, B.C.

Gentlemen:

"Canadian Atlas Diesel Engine Co. of Vancouver, B.C., agrees to buy from McLeod Engines Ltd., all their stock of Chrysler marine engines, Chrysler marine parts, and marine accessories; also one Dodge service truck.

"It is agreed that Canadian Atlas Diesel Engine Co. will pay wages of one parts man in Victoria, and one parts man in Vancouver, as from January 28th, 1949, for taking inventory of stocks on hand.

"It is further agreed that Canadian Atlas Diesel Engine Co. will supply to McLeod Engines Limited the parts necessary to complete engines now being overhauled at Begg Brothers Limited. These parts to be supplied at cost.

"It is further agreed that Canadian Atlas Diesel Engine Co. will supply McLeod Engines Limited with the necessary

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Chrysler engines to complete the orders shown on the attached sheet.

"All merchandise purchased will be first-class condition and at actual cost.

"The above is agreed to when mutual termination of Chrysler marine franchise in the Province of British Columbia is negotiated.

"Yours very truly,

CANADIAN ATLAS DIESEL ENGINE CO. LTD.

per: A. G. Cunnings."

When, according to McLeod, Cunnings asked for a list of the orders referred to, he told him that the records were in Victoria and said that if Proctor and Cunnings would come to Victoria on the following day, he (McLeod) would have the list ready. On January 27th the parties met again at the office of the respondent in Victoria, at which time McLeod says that the import permits for 47 engines were shown to Proctor and Cunnings. McLeod had dictated and presented to Cunnings a letter purporting to contain a list of the orders which his company had on hand and giving information as to the number of engines already delivered. This read as follows:

"1221 Wharf Street
Victoria, B.C.
January 27th, 1949

"Mr. A. G. Cunnings,
Canadian Atlas Diesel Co.,
1859 West Georgia Street,
VANCOUVER, B.C.

Dear Sir:

"As agreed in our meeting yesterday, we are listing below orders we have on hand, and in the other column, numbers of engines that have been delivered against these orders. You will see the orders number one hundred and twenty-four and the deliveries fifty, which will leave us seventy-four to be delivered.

Name	Orders	Delivered
B. C. Packers Ltd.	30	7
Nelson Bros. Fisheries	15	—
Canadian Fishing Co.	20	Customs 6
A.B.C. — North Pacific	30	25
A.B.C. — Phoenix	13	6
R. Cosulich Boat Wks.	4	2
Fred Radler	2	—

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Pete Sather	1	—
Kyuquot Trollers	7	3
S. Hansen	2	1
	—	—
Total	124	50

Yours very truly,

McLEOD ENGINES LTD.
President."

The letter was clearly intended to take the place of the list of "orders shown on the attached sheet" mentioned in the fourth paragraph of the letter of January 26th. McLeod says that at this time the respondent had 16 other import permits at the Customs House, presumably in Victoria. The original letters from the four packing companies and the Kyuquot Trollers Co-Operative Ass'n, according to him, had been sent to Ottawa for the purpose of obtaining permits and apparently no copies were available. It is not suggested that their contents or the contents of whatever documents had been obtained to enable the respondent to obtain the other 16 permits were made known to Proctor or Cunnings. Nothing in the nature of written orders for any engines was produced to them.

The list given to Cunnings, as will be noted, contained no specifications of the engines for which the respondent had orders. It would be necessary, according to him, for the purpose of ordering an engine to have particulars as to whether engines with reduction gears were required, whether they were to have straight drives, right or left-hand rotation, the size of the shaft required, and whether they were to have 6 or 12-volt ignition. The permits for the 47 engines, which McLeod says were produced at Victoria, merely specified that the engines imported were to be marine engines "with 2.56 to 1 reduction gears and 6 volt electrical systems". McLeod clearly knew, while Proctor and Cunnings did not, that the documents obtained from their customers and which, he said, had been sent to Ottawa, did not contain the necessary particulars.

If any evidence were needed (and I think it is not) to establish the fact, it is made clear in the cross-examination of McLeod that he intended by the letter of January 27th to represent to Proctor and Cunnings that the respondent had orders from the parties named for the number of engines stated or, as he also expressed it, that "we had those sold".

Following the discussion at Victoria, Cunnings, who lived in the United States, dictated a memorandum, a copy of which

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was sent to McLeod at Victoria. That document was in the following terms:

"A. G. Cunnings — Terminal Island

J. C. Alger — Vancouver

January 31, 1949

c.c. Mr. W. H. Stephenson — Oakland,

Mr. E. Evans — Vancouver,

Mr. Fred McLeod — McLeod Engines
Limited, Victoria, B.C.

MCLEOD ENGINES LIMITED

"Canadian Atlas Diesel Engines Limited has agreed to supply engines to the above company to make deliveries on the list of sales now in our hands at our actual cost, plus \$30.00 to cover our cost of handling. All engines are to be started in our shop to insure engines being in proper mechanical condition at time of delivery.

"McLeod Engines Limited will issue purchase request with shipping instructions for each engine, and will also issue payment for same direct to Canadian Atlas Diesel Engines Limited.

"The matter of fishermen's rebate will be worked out between Mr. Evans and McLeod Engines Limited.

(Sgd.) A. G. Cunnings."

Between the date of this memorandum and March 18, 1949, 19 of the 74 engines were delivered at the direction of the respondent to their customers. No written orders from the purchasers were produced in order to obtain these engines. On the latter date an officer of the respondent company requisitioned a Chrysler marine engine and was told by Cunnings that if he would bring in a purchase order given before January 27th the appellant would supply the engine, whereupon the officer (Bramston) left and did not return. Thereafter the matter was dealt with in correspondence by the solicitors for the respective parties and the action followed.

The point to be decided is the meaning to be assigned to the word "orders" in the letter of January 26, 1949. The issue is not affected, in my opinion, either by what took place at Victoria on January 27th or by the terms of the memorandum of January 31st. The signature of Cunnings on the letter of January 27th was, as the document shows, merely an acknowledgment of the receipt of the letter. The document was admittedly given for the sole purpose of furnishing details of the orders mentioned in the letter given the day previous and, accepting McLeod's own version of the matter, nothing that took place at Victoria altered the position of the parties. The memoran-

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dum of January 31st was prepared for the purpose only of recording for the information of the appellant's officers in Vancouver and of W. H. Stephenson of Oakland (whose status is not given) particulars of the manner in which the undertaking given on January 26th was to be carried out. That in preparing this memorandum there was no intention to contract on the part of the appellant seems perfectly clear upon the evidence.

The documents upon which the respondent must rely as constituting orders are the letters which it obtained from the Canadian Fishing Co. Ltd., British Columbia Packers Ltd., Anglo-British Columbia Packing Co. Ltd. and Kyuquot Trollers Co-Operative Ass'n prior to January 26, 1949. The judgment delivered at the trial and that of Robertson J.A. in the Court of Appeal proceed on the footing that the word "orders" in the letter of January 26th should be construed as including these letters. With great respect, I am unable to agree with this conclusion. The pleadings of the respondent do not assert that by custom in the trade or otherwise the word "orders" should be construed otherwise than in accordance with its commonly accepted meaning. Oral evidence was admitted from various purchasing agents of the parties by whom these letters were written as to what was intended to be conveyed by them, some asserting that the intention was to obligate their employers and others to the contrary, that they were merely estimates. All of this evidence was, in my opinion, inadmissible: in the absence of any ambiguity in the language employed and in the state of the pleadings, the question of interpretation was for the trial Judge. The word "order" is one which in different contexts may have a variety of meanings: in the business of buying and selling goods its commonly accepted meaning is, in my opinion, that assigned to it in the New Oxford Dictionary, namely, a direction to make, provide or furnish anything at the responsibility of the person ordering. The letters from Nelson Bros. Fisheries Ltd., the Canadian Fishing Co. Ltd., the British Columbia Packers Ltd. and the Kyuquot Trollers Co-Operative Ass'n were by their very terms simply estimates of the requirements of marine engines of these various organizations during the coming season and included an expression of hope that the respondents would be in a position to deliver these engines when required. The language of the letter from the Anglo-British Columbia Packing Co. of October 13, 1948, varied in this respect that it contained the statement that the company would require 13 engines during the course of the next 6 months. None of these letters were acknowledged by the re-

spondent. None of them contained a direction or request to supply goods on an offer capable of acceptance. The purpose of giving these documents to the respondent was to enable the latter to apply for import permits to the Department of Trade and Commerce and for that purpose alone. Both parties contemplated that when the engines were required, orders would be given, at which time of necessity the particulars of the required machine would be furnished. While, according to the letter of January 27, 1949, several of the engines for which the respondent claimed to have orders from the packing companies and the Kyuquot Trollers were said to have been theretofore delivered. The actual orders, pursuant to which they were delivered, were not produced. What was done, however, in the case of the British Columbia Packers Ltd. is made clear from two written orders from this company for the delivery of Chrysler engines which were sent to the respondent by their purchasing agents, Mills & Packers Ltd., on January 25th, and in the case of Nelson Brothers Fisheries Ltd. by their written order for one Chrysler engine dated February 9, 1949, addressed to the respondent. Indeed McLeod, while being cross-examined, after referring to the letters from the four packing companies which, he said, had been sent to Ottawa to obtain import permits and being asked if that was all that he had said replied: "In some cases we had an order as well and it was also attached to the application along with that letter of essentiality", the latter expression referring to letters of the nature obtained from the fishing companies.

The learned trial Judge attached importance to the fact that Cunnings signed the letter of January 27, 1949, written by the respondent, saying in part: "That was the time to stipulate for the production of confirmatory evidence of the orders. He signed without reservation or stipulation."

The document itself makes it clear that Cunnings' signature at the bottom of the letter in question was merely to acknowledge its receipt and I find nothing in the evidence to suggest that he signed for any other purpose. A further passage from the reasons for judgment states that the learned trial Judge was completely satisfied that the present appellant knew perfectly well the practice which prevailed as between the fishing companies and importers and that "it substantially knew the nature of the documents which the plaintiff was treating as orders". As to this, McLeod had said that Proctor was aware of the procedure to be followed in obtaining import permits, and again that Proctor "had watched me for months obtaining these

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things (permits)". As to this, the *Emergency Exchange Conservation Act* of 1948 had only been proclaimed in April of that year and there is no evidence of any practice which prevailed in regard to obtaining these permits as between the fishing companies and importers, or as to how they had been obtained by any importer other than the respondent. Proctor was an employee of the Chrysler Corporation and not, so far as the evidence shows, connected in any manner with the appellant, though he was familiar with its business dealings with his own employers, and even had Proctor been aware of the terms of the so-called letters of essentiality obtained from the fishing companies (and there is no evidence that he was so aware) it could not, in my opinion, affect the obligation of the appellant under the agreement of January 26th.

The learned trial Judge further accepted the evidence of McLeod and the respondent's other witnesses where they differed from those called on behalf of the appellant. The appellant had by its counterclaim asked for the rectification of the agreement on the ground that the letters did not express the terms agreed upon and that it was intended that the obligation of the appellant was simply "to fulfil bona fide and enforceable orders". Some evidence was given for the appellant that some such expressions had been used in the course of the negotiations and this was rejected. Apart from the learned Judge's finding, which was fatal to the claim for rectification, I am unable to appreciate the necessity for any such rectification. The word "orders" without more would import that they were orders given in good faith. Except as the question of credibility affected this issue, the decision of the matter did not depend upon the weight to be assigned to the evidence: the question was one of the construction of the language contained in a writing.

The parties to this transaction were experienced business men who after negotiations resulting in an agreement between them evidenced that agreement by the letter of January 26, 1949. Their intention is to be gathered from what I regard as the clear and unambiguous terms of that document. The obligation of the appellant was not to supply a defined number of engines but rather the engines required to complete the orders which the respondent claimed to have. The list given by the respondents to the appellant on January 27th did not contain, so far as the evidence shows, the names of any persons who had given orders for engines to the respondent. In my

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opinion, no breach of the agreement by the appellant has been shown.

I would allow this appeal with costs throughout and direct that the action be dismissed. The cross-appeal should be dismissed with costs.

CARTWRIGHT J., dissenting, concurs with RAND J.

Appeal allowed; cross-appeal dismissed.